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No. 84-1023

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

FERNANDO ROJAS-CONTRERAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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Respondent's arguments in opposition to further review in this case are insubstantial.

1. Respondent makes little effort to respond to our construction of the Speedy Trial Act. He disregards, inter alia, the language of Section 3161(c)(2), the other provisions of the Act with which it must be read, and the decisions of the First, Second, Fifth, and Seventh Circuits that are contrary to the decision below.[1] Only two points need be added to what we have already said in the petition regarding the merits of the question presented.

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[1]Respondent's reliance (Br. in Opp. 5-6) on *United States* v. *Wooten*, 688 F.2d 941, 951 (4th Cir. 1982), is misplaced. Read in context the language he quotes lends no support to his contentions. See Pet. 16 n.8.

First, respondent implies (Br. in Opp. 4-5) that, under 18 U.S.C. 3161(c)(1), the government was entitled to a new 70-day period following his arraignment on the superseding indictment within which to bring him to trial. Respondent apparently reasons that he accordingly was entitled to a new 30-day defense preparation period. We agree that the same rule generally should govern restarting of the Speedy Trial Act clock for purposes of both the 30-day minimum and 70-day maximum trial date provisions in this situation. See Pet. 12-13 & n.5. But respondent's other premise is false. As Section 3161(d)(1) makes clear, notwithstanding the return of the superseding indictment, the government was *not* entitled to a new 70-day period in which to bring respondent to trial here. See Pet. 10-11 & n.4. Accordingly, respondent's analogy to Section 3161(c)(1) is unavailing.

Second, respondent appears to suggest (Br. in Opp. 5) that if he had elected to proceed pro se following the return of the superseding indictment he would have been allowed a new 30-day trial preparation period. This is plainly an incorrect reading of Section 3161(c)(2). While a decision to discharge counsel and proceed pro se might well occasion a continuance in the trial court's discretion, it would not force the court to continue the case automatically under Section 3161(c)(2). See Pet. 13-14. A defendant whose trial commences not "less than thirty days from the date on which [he] *first* appears through counsel" (18 U.S.C. 3161(c)(2) (emphasis added)) is not entitled automatically to a second 30-day preparation period following his election to proceed pro se. In any event, even if our reading of Section 3161(c)(2) were in this respect incorrect, it does not follow that respondent, who was represented by the same lawyer throughout, was entitled to a new trial preparation period.

2. Citing *Lane* v. *Williams*, 455 U.S. 624 (1982), respondent claims (Br. in Opp. 6) that the completion of his sentence and his ensuing departure from the United States render this case moot. This contention is incorrect.

We emphasize at the outset that this case arises on respondent's direct appeal from the judgment of conviction entered in his case. Accordingly, the policy that influences the standard for determining mootness in this context differs from that applicable to a collateral challenge to a final judgment. See *Lane* v. *Williams*, 455 U.S. at 633 n.13 ("Collateral review of a final judgment is not an endeavor to be undertaken lightly."). It is doubtful that a defendant's direct appeal from a felony conviction should ever be deemed moot as a result of the expiration of his sentence. See *Pennsylvania* v. *Mimms*, 434 U.S. 106, 108 n.3 (1977); *Sibron* v. *New York*, 392 U.S. 40, 51 (1968). The rule established by *Sibron*, which was reiterated in *Lane* (455 U.S. at 632), is that "a criminal case is moot only if it is shown that there is no possibility that any collateral consequences will be imposed on the basis of the challenged conviction" (392 U.S. at 57). Respondent plainly cannot make this demonstration.

First, a prior conviction such as respondent's will generally affect sentencing in any future federal criminal prosecution of respondent. See also 18 U.S.C. 3575 (sentence enhancement for dangerous special offenders). This is a sufficiently significant collateral consequence of the conviction to make appellate review possible. *Pennsylvania* v. *Mimms*, 434 U.S. at 108 n.3.[2] Especially given respondent's recurring violations of United States immigration laws (see Pet. 2-3), this is not a speculative concern. See *Pennsylvania*

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[2]No contrary rule should be extracted from *Lane*, 455 U.S. at 632-633 & n.13. That case arose on collateral review — a matter of some importance to the result (see page 3, *supra*). Moreover, *Lane* is carefully and narrowly addressed to the effect of completion of a parole term upon a challenge limited to the lawfulness of the parole term. The Court's opinion makes clear that a challenge to a judgment of conviction would not be rendered moot in the circumstances of that case. 455 U.S. at 630-631 & n.10; see also *id.* at 632-633.

v. *Mimms*, 434 U.S. at 108-109 n.3.[3] Second, under 18 U.S.C. App. 1202(a)(1), the felony illegal entry conviction disables him from lawful possession of firearms, and renders him liable to substantial fines and imprisonment in the event of a violation even if he should in the future be lawfully admitted to the United States. See *Fiswick* v. *United States*, 329 U.S. 211, 222 (1946) (alien's felony conviction reviewable, inter alia, because conviction would undermine a future application for naturalization, and would, in the event of naturalization, cause a loss of civil rights).

Accordingly, the fact that respondent has served his sentence does not deprive him of a concrete interest in avoiding the conviction, and it does not deprive the government of a comparable interest in reinstating that conviction and having the benefit of the collateral consequences that the law

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[3]In light of this track record, respondent's departure from this country does not affect the result. Cf. *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), slip op. 2 n.2. Indeed, the United States Attorney has advised us that, subsequent to the court of appeals' decision in this case, on October 5, 1984, respondent was again apprehended and charged with illegal entry into the United States. Respondent was once again indicted for violations of 8 U.S.C. 1325 and 1326 on October 17, 1984, and on December 19, 1984 pleaded guilty to a felony violation of 8 U.S.C. 1325. Cr. No. 84-0919G (S.D. Cal.). The case is presently set for sentencing on February 11, 1985. We are advised that the presentence report, a copy of which has, in the ordinary course, been provided to respondent's counsel, indicates that respondent's 1983 conviction was reversed by the court of appeals, and that we have sought review of that decision in this Court. We are also advised that respondent's presentence report reflects that he has been apprehended for unlawful entry into the United States on numerous occasions.

visits upon a convicted felon.[4] As a practical matter, moreover, the representation of respondent by the Federal Defenders of San Diego assures that the Court will receive a full adversary presentation in support of the judgment of the court of appeals. The questions presented are, as respondent appears to acknowledge (Br. in Opp. 6), recurring ones in the lower federal courts. Their prompt resolution will have a salutary impact on the administration of justice.

For the foregoing reasons and those previously stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

FEBRUARY 1985

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[4]As the Court explained in *Mimms* (434 U.S. at 108 n.3):

> If the prospect of the State's visiting such collateral consequences on a criminal defendant who has served his sentence is a sufficient burden as to enable him to seek reversal of a decision affirming his conviction, the prospect of the State's inability to impose such a burden following a reversal of the conviction of a criminal defendant in its own courts must likewise be sufficient to enable the State to obtain review of its claims on the merits here.